

STATE OF INDIANA)
) SS: IN THE STEUBEN SUPERIOR COURT
COUNTY OF STEUBEN)

PAUL T. VORNDRAN and)
SHIRLEY A. VORNDRAN,)
 Petitioners)
vs.) CAUSE NO. 76D01-0802-MI-76
)
JACK E. ROEBEL, SUZANNE L.)
ROEBEL, TED A. AGNESS,)
SANDRA AGNESS, THOMAS L.)
GUTHRIE, JUDITH E. GUTHRIE)
and LOGAN D. MAYS,)
 Respondents)

COURT'S FINDING OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

On February 17, 2009, hearing was held on the Petition for Judicial Review of Administrative Decision filed by Paul T. Vorndran and Shirley A. Vorndran (the "Vordrans"). Petitioners appeared by counsel, Jeremy J. Grogg and Shane C. Mulholland. Respondents appeared by counsel, James A. Federoff. The Court having heard the arguments of counsel and having considered all evidence and all pleadings and memorandums filed in this cause, including the Petition, the Respondent's Response to Verified Petition For Judicial Review, the materials contained in the Record of Administrative Proceeding for use on Judicial Review (the "NRC Record") Petitioner's Memorandum In Support of their Petition For Judicial Review of Administrative Action and Designation of Exhibits, Respondent's Memorandum In Opposition To Petition For Judicial Review of Administrative Action and Respondent's Appendix and the Petitioner's Reply Memorandum in further support of their Petition For Judicial Review of Administrative Action hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Court finds that this matter is before this Court pursuant to the Vorndrans' Verified Petition for Judicial Review of an Administrative Decision ("the Vorndrans' Petition"). The Vorndrans' Petition was timely filed with this Court on February 29, 2008, pursuant to Indiana Code § 4-21.5-5-1, et al.

2. The Court further finds that this Court has jurisdiction over the parties to this matter, this Court has jurisdiction over the subject matter of this action, and venue is appropriate in the Steuben County Superior Court pursuant to Indiana Code §4-21.5-5-6.

3. Respondents are the owners of all of the units in the South Bay Condominium Horizontal Property Regime ("South Bay"), which is located adjacent to Lake James, a public freshwater lake in Steuben County, Indiana.

4. South Bay is situated on a portion of Lake James that forms a tight, concave cove, with the shoreline of the cove forming approximately one-third to a full circle. South Bay is located approximately in the center of the properties along the cove shoreline.

5. There are four units in South Bay, all of which are owned by Respondents.

6. A pier exists that serves South Bay (the "South Bay Pier"), and consists of twelve slips, some of which are utilized by individuals other than Respondents.

7. There exists a parcel of property with approximately 10 feet of lake frontage that is located between South Bay and the Vorndrans' property.

8. In exchange for the agreement not to construct and install their own pier, John J. and Mary Ann Pinnington (the "Pinningtons") were granted an easement by the developer of South Bay, which gave them specific riparian rights, and provided them with dock space for two boats on the South Bay Pier (the "Pinnington Easement").

9. An easement also was granted to Tamara and Kelly Klink (the "Klinks") by the developer of South Bay, which easement specifically grants them riparian rights, and provided them with dock space on the South Bay Pier for one boat and two personal water craft (the "Klink Easement").

10. Given the configuration of the shoreline, Respondents previously petitioned the NRC for authority to erect the South Bay Pier, which petition was granted in that proceeding (the "Prior NRC Proceeding") following a mediation.

11. At the conclusion of the referenced mediation, the Petitioners in the Prior NRC Proceeding (which included Respondents), the Vorndrans and others entered into a Memorandum of Understanding (the "MOU"), which is a private agreement among only those parties.

12. The Indiana Department of Natural Resources (INDR), Matthew A., Michael A., Leonard E., Virginia B., and William C. Branning (collectively, the "Brannings"), Michael Burkhalter ("Burkhalter"), Steve M. Krug ("Krug"), and Karl Hartman ("Hartman") all were named parties in the Prior NRC Proceeding as Respondents, and were represented by counsel.

13. INDR, the Brannings, Burkhalter, Krug, and Hartman were not parties to the MOU.

14. Under the MOU, the Vorndrans agreed not to object to the placement and configuration of the South Bay Pier.

15. As part of the MOU, Respondents agreed not to object to the placement of a boat lift (the "Lift") installed on the right side of the Vorndrans' pier (the "Vorndran Pier"), which is the side nearest the South Bay Pier, with the lakeward end of the Lift to extend no

further than the end of the Vorndran Pier. Previously, the Vorndrans placed the Lift on the northerly (or left) side of the Vorndran Pier.

16. The MOU was never approved or disapproved by the NRC, nor was the MOU approved by INDR, the Brannings, Burkhalter, Krug, or Hartman, who were the other parties in the Prior NRC Proceeding.

17. After entering into the MOU, Respondents, the Vorndrans, IDNR, the Brannings, Burkhalter, Krug, and Hartman, by their respective counsel, all signed a Consent Declaratory Judgment, which was approved by the NRC as part of the judgment entered in the Prior NRC Proceeding (the "Prior Judgment"). The Prior Judgment was never appealed by any party to it.

18. The time to seek judicial review of the Prior Judgment has long since expired.

19. The Prior Judgment serves as Respondents' group pier permit to install and maintain the South Bay Pier, with the existing dimensions and configuration.

20. The Prior Judgment makes no reference to the MOU.

21. The Prior Judgment relates solely to the South Bay Pier, and makes no mention of the Vorndran Pier.

22. That after the entry of the Prior Judgment, Vordrans placed a canvas cover on their boat lift in such manner that it extended beyond their pier as did their boat when it was on the lift.

23. That due to the proximity of Vordrans boat lift, cover and boat some of the South Bay pier slips were largely unusable and otherwise caused navigational problems and unsafe navigational conditions.

24. Due to the above-described navigational problems and unsafe conditions, Respondents filed with the NRC a Petition for Administrative Review ("Respondents' Petition"), which sought entry of a declaration that Respondents' ability to safely navigate their watercraft at or around the South Bay Pier was unduly restricted, a safety hazard was created, and there was interference with Respondents' riparian rights (the "Current NCR Proceeding").

25. Respondents' Petition was not intended, and does not object, to the placement of the Vorndran Pier or the Lift. Rather, Respondents' Petition, and the motion for summary judgment filed in connection with Respondents' Petition, sought the removal or adjustment of the location of the Lift Cover and the Vorndrans' boat, so that they would not extend beyond the end of the Vorndran Pier, and would not otherwise interfere with Respondents' riparian rights or create a hazard to the safe navigation of watercraft.

26. In response to Respondents' Petition, on April 10, 2007, the Vordrans filed a Response to Petition for Administrative Review and Counterclaim. That filing did not allege any affirmative defenses.

27. The Vordrans' Counterclaim sought, among other things, a declaration that the South Bay Pier fails to meet the criteria for a group pier permit, that the South Bay Pier is located and configured in violation of the Prior Judgment and the MOU, and that the Prior Judgment should be set aside.

28. The Vordrans did not file a Third-Party Complaint in the Current NRC Proceeding, joining as party respondents IDNR, the Brannings, Burkhalter, Krug, Hartman, the Pinningtons, or the Klinks, for purposes of the Vordrans' claims and the

interests of those other parties related to the Prior Judgment, and the group pier permit that was issued for the South Bay Pier as part of it.

29. The Vorndrans did not present any evidence or argument in the Current NRC Proceeding that resulted in the Final NRC Judgment, to suggest that the South Bay Pier was or would be placed in a manner inconsistent with the MOU or the Prior Judgment, or in a location different from where the South Bay Pier always was (including when the MOU and Prior Judgment were entered).

30. The Vordrans did not present any affidavits or other sworn testimony in the Current NRC Proceeding that resulted in the Final NRC Judgment.

31. After consideration of the evidence and argument of counsel, Stephen L. Lucas, the Administrative Law Judge assigned to the matter (the "ALJ") entered a 15-page Findings Of Fact and Conclusions Of Law and Nonfinal Order of Summary Judgment (the "ALJ Decision").

32. The Vorndrans filed Objections to the ALJ Decision, and on February 1, 2008, the AOPA Committee for the NRC entered the Final NRC Judgment, a copy of which is attached to this Order as "Exhibit "A", incorporated herein and adopted as part of this Court's Findings Of Fact and Conclusions of Law.

CONCLUSIONS OF LAW

1. The Final NRC Judgment may only be set aside if it is: (1) arbitrary and capricious; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. Indiana State Bd. Of Educ. v. Brownsburg Community School Corp., 865 N.E.2d 660, 666

(Ind. Ct. App. 2007). “Moreover, an interpretation of statutes and regulations and statutes is entitled to great weight unless the interpretation would be inconsistent with the law itself.” Id. “The reviewing court should generally accept an agency’s reasonable interpretation of regulations and statutes.” Id.

2. In reviewing questions of fact related to a decision of an administrative agency, such as the Final NRC Judgment, this Court cannot reweigh the evidence and must review the record in the light most favorable to the administrative proceedings. Regester v. Ind. State Bd. Of Nursing, 703 N.E.2d 147, 151 (Ind.Ct.App. 2000), and determine whether the administrative findings are supported by substantial evidence. Bucko Const. Co., Inc. v. Indiana Dept. of Transp., 850 N.E.2d 1008, 1017 (Ind.Ct.App. 2006).

3. The burden of establishing the invalidity of the Final NRC Judgment is on the Vordrans. Brownsburg, 865 N.E.2d at 666 citing I.C. §4-21.5-5-14.

4. The Vorndrans have failed to satisfy their burden of establishing the invalidity of the Final NRC Judgment.

5. The Prior Judgment constitutes the group pier permit for the South Bay Pier, which is a written license required for the placement and maintenance of the South Bay Pier, as contemplated by 312 IAC 11-3-1.

6. The Vorndrans have established no basis under the Administrative Orders and Procedures Act (“AOPA”) why the Prior Judgment could properly be set aside.

7. Ind. Code §4-21.5-3-31 establishes the circumstances under which an agency can modify a final order, such as the Prior Judgment.

8. The Final NRC Judgment held that the Vorndrans failed to present an appropriate basis for the modification of the Prior Judgment.
9. The above determination went unchallenged in these proceedings.
10. The Vorndrans have failed to meet their burden to establish that the Prior Judgment was modified.
11. The Prior Judgment cannot be modified.
12. The Final NRC Judgment determined that only IDNR can seek the revocation of the Prior Judgment.
13. The foregoing is a correct statement of the law.
14. The Vordrans did not challenge the foregoing statement of the law.
15. The Vordrans have failed to meet their burden to establish that one other than the DNR can seek the revocation of the Prior Judgment.
16. "A collateral attack on a judgment has been defined as a judicial proceeding pursued to avoid, defeat, evade, or deny the validity and effect of a valid judgment or decree." City of Gary Common Council v. White River Environ. Partnership-Gary, 713 N.E.2d 893, 895 (Ind.Ct.App. 1999). Such attacks are not permitted under Indiana law and, generally, judgments are "presumed valid until set aside and [are] not subject to collateral attack unless procured by fraud." Hiles v. Nuli, 716 N.E.2d 1003, 1005 (Ind.Ct.App. 1999)(emphasis in original). The same principle applies to determinations made by administrative bodies and, when such body acts within its jurisdiction and under authority of law, such determinations are not subject to collateral attack. Yellow Cab Co. of Bloomington, Inc. v. Williams, 583 N.E.2d 774, 777 (Ind.Ct. App. 1991).

17. The Final NRC Judgment correctly concluded that the Vordrans' challenge to the Prior Judgment was an impermissible collateral attack.

18. That Vordrans' contract arguments including the mistake of fact, lack or failure of consideration, mutual mistake or absence of consent and breach of contract, while interesting and challenging, remain an impermissible collateral attack against the prior judgment.

19. The Final NRC Judgment is affirmed.

20. The MOU not having been incorporated in to the Prior Judgment, is a separate and private agreement between the parties to that understanding.

21. The Vorndrans' argument that Respondents breached the MOU by initiating the Current NRC Proceeding, which in turn, renders the Prior Judgment void, is an impermissible collateral attack on the Prior Judgment.

22. The Vorndrans' argument that the alleged breach of the MOU constitutes a repudiation of the Prior Judgment is an impermissible collateral attack on the Prior Judgment.

23. The MOU is a private agreement, separate from the Prior Judgment, and is outside the purview of the NRC.

24. That the MOU and Prior Judgment are two separate documents that do not have to be interpreted and construed together by the NRC.

25. That the Final NRC Judgment correctly held that MOU is a private agreement not incorporated into the Prior Judgment.

26. That the Final NRC Judgment properly upheld the prior judgment and the Vorndrans failed to meet their burden to set aside the Final NRC Judgment.

23. The MOU is a private agreement, separate from the Prior Judgment, and is outside the purview of the NRC.

24. That the MOU and Prior Judgment are two separate documents that do not have to be interpreted and construed together by the NRC.

25. That the Final NRC Judgment correctly held that MOU is a private agreement not incorporated into the Prior Judgment.

26. That the Final NRC Judgment properly upheld the prior judgment and the Vorndrans failed to meet their burden to set aside the Final NRC Judgment.

27. That the Final NRC Judgment is affirmed and these proceedings are resolved in favor of Respondents.

JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Final NRC Judgment is affirmed in its entirety and the Petition For Judicial Review Of Administrative Decision is dismissed.

Dated: 4-3-09



Monte L. Brown, Special Judge
Steuben Superior Court II

Copies to:

- ___ James A. Federoff
- ___ Jeremy J. Grogg
- ___ Office of Indiana Attorney General
- ___ Indiana Natural Resources Commission